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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL G. DOUGLAS, Defendant and Appellant.	D059950 (Super. Ct. No. SCN221675)

APPEAL from a judgment of the Superior Court of San Diego County, Harry M. Elias, Judge. Affirmed.

A jury convicted Michael G. Douglas of five counts: three counts of distributing matter depicting a person under the age of 18 engaging in sexual conduct (Pen. Code,[1] § 311.1, subd. (a); counts 1, 2 and 3); one count of possessing matter depicting a person under the age of 18 engaging in sexual conduct (§ 311.1, subd. (a); count 4); and one count of attempting to send harmful matter to a minor by electronic means (§§ 664 &

1 All statutory references are to the Penal Code unless otherwise specified.

288.2, subd. (b); count 5). The court sentenced Douglas to prison for two years four months, suspended execution of the sentence and granted Douglas five years' formal probation conditioned on him serving 180 days in county jail.

On appeal, Douglas contends the trial court should have stayed his sentence on count 5 pursuant to section 654, subdivision (a). We disagree and affirm his judgment of conviction and sentence.

FACTUAL AND PROCEDURAL BACKGROUND[2]

Detective Anthony Smith from the San Antonio Police Department's child exploitation vice unit was on an Internet chat room Web site posing as a 13-year-old girl "Vanessa" with a screen name of "angel_babysa" to catch Internet child predators. In early 2006, Douglas, using a screen name "blacknight7vball" initiated a chat with Vanessa on this Web site. Douglas identified himself as a 28-year-old male from Southern California and asked Vanessa if she was willing to talk with an "older guy." Although Vanessa reiterated to Douglas that she was only 13, he continued to pursue chatting with her.

On February 14, 2006, during their first chat session Douglas told Vanessa her first time (ostensibly having sexual intercourse) should be with an older guy because "[he] can teach you." Then he went on to say, "You know I wish I was there, wish I was closer" because he wanted to be the one to "teach" Vanessa.

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2 We view the evidence in the light most favorable to the judgment. (*People v. Gaut* (2002) 95 Cal.App.4th 1425, 1427.) Certain portions of the factual and procedural history are discussed *post*.

Further, Douglas told Vanessa that "[h]e likes stories on the Internet, printed out stories, sexual stories" and sent Vanessa a link to a private album with a large number of pornographic photographs. In addition, Douglas sent Vanessa several other links, including a link to a free adult site which he said has "lots of things for you."

The following day, Douglas again contacted Vanessa and said: "How's my new favorite cutie doing?" During this chat, Douglas sent Vanessa more pornographic photographs. While directing her to look at some of the photographs from the album, he stated: "I like the way it was shot, I like to lick her pussy." He then looked at a pregnant teen photograph and told Vanessa: "I think pregnant teens are sexy."

On February 28, 2006, Douglas contacted Vanessa again and said: "I have more photos to show you if you're in the mood." During this session, Douglas and Vanessa had a lot "more sex chatting." He asked Vanessa about her physical appearance and commented on how he liked women/girls with small breasts. Douglas also described sexual things he wanted to do with Vanessa. During this chat, Vanessa asked Douglas about the name on his profile, Michael Douglas, and if he was the famous actor. He replied: "Nope, I wish I was." He also told Vanessa that "[he] can always travel for the right person once [he] get[s] to know [her]."

On March 13, 2006, Douglas sent Vanessa a link from "shaggys_dope"[3] to view pornographic photographs of a nine- and a 15-year-old girl. In looking at the photographs Douglas commented to Vanessa: "I think they're hot."

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3 "[S]haggy_dope" is a photo album/Web site containing pornographic pictures.

On August 9, 2006, Douglas shared with Vanessa a shadowphototrader album with child pornographic photographs. These photographs were from sites containing "preteen hardcore" pornography and were also identified as "lolita" photographs.

On May 3, 2006, San Diego County Deputy Sheriff Anthony Torres, who is also part of the Internet Crimes Against Children (ICAC) task force, received 21 cyber tips about shaggys_dope for its content of child pornography photographs. Torres traced the shaggys_dope account to an Internet protocol (IP) address at Douglas's residence. A subsequent search of Douglas's home computer produced a large number of child pornographic photographs and videos. Also, shaggys_dope was associated with both a MySpace account belonging to an individual named Michael who lived in Encinitas and the e-mail was linked to the "blacknight7@hotmail.com" account.

During a search of Douglas's residence, detectives found a compact disc near the home computer that contained videos of child pornography. Several of the videos had young girls approximately nine to 13 years of age orally copulating adult males. Some of the videos depicted young girls involved with masturbation, intercourse and oral copulation with adult males and adult females.

Additionally, the ICAC task force searched Douglas's vehicle and discovered condoms, handcuffs, hand and body lotion, three knives, a mag light, emergency flashers, some type of elastic rubber and gloves.

At trial, Douglas consistently denied committing the crimes and claimed Steven Andrews, a friend with alleged access to Douglas's computer accounts and passwords, had committed all the crimes.

DISCUSSION

Douglas contends that pursuant to section 654, subdivision (a) the trial court should have stayed his sentence on count 5 because the behavior punished in that count "was or could have been" the same behavior that was punished in either counts 2 or 3. Specifically, Douglas contends that because the trial court failed to read CALCRIM No. 3500—the unanimity instruction—to the jury, despite the fact the instruction was included in the packet of instructions the jury received for use in its deliberations, Douglas "could have been" punished in count 5 for the same conduct he was punished for in counts 2 or 3.

A. *Unanimity Instruction*

The California Constitution requires a unanimous jury verdict to support a criminal conviction. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132; see also Cal. Const., art. I, § 16.) "It is obvious that if the guarantee of unanimity means anything, it means at a minimum that all the jurors must agree the evidence shows guilt of the charged offense beyond a reasonable doubt." (*People v. Sutherland* (1993) 17 Cal.App.4th 602, 611.) "The [unanimity] instruction is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed." (*Ibid*.) In other words, in a criminal case when evidence suggests more than one discrete crime, the prosecution must elect a specific crime or the trial court must sua sponte instruct the jury on unanimity of the decision. (*People v. Russo*, *supra*, 25 Cal.4th at p. 1132.)

However, a unanimity instruction is not required when the "continuous conduct" rule applies, such that the alleged acts are so closely connected that they are considered to be part of the same transaction. (*People v. Stankewitz* (1990) 51 Cal.3d 72, 100.) This exception applies "[w]hen the defendant offers essentially the same defense to each of the acts, and there is no reasonable basis for the jury to distinguish between them." (*Ibid*.)

A trial court is required to give a unanimity instruction when the acts are fragmented by time and space. (*People v. Wolfe* (2003) 114 Cal.App.4th 177, 185.) "When the trial court erroneously fails to give a unanimity instruction, ... [t]his lowers the prosecution's burden of proof and therefore violates federal constitutional law." (*Id*. at p. 187.) Therefore, failure to give a unanimity instruction requires us to apply a beyond a reasonable doubt standard in determining whether the error was harmless or prejudicial. (*Ibid*.)

Douglas contends, and the People concede,[4] that the court should have read modified CALCRIM No. 3500[5] because Douglas was charged with and convicted in

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4 We accept for purposes of this appeal that the trial court was required to give the unanimity instruction based on the People's concession. We note that Douglas offered a single defense to all counts charged against him, to wit: that his friend (Steve Andrews) was the one who committed these crimes. We thus question whether a unanimity instruction was even necessary in connection with count 5. (See *People v. Stankewitz, supra*, 51 Cal.3d at p. 100 [noting the unamity instruction is not required "when the defendant offers essentially the same defense to each of the acts"].)

5 The unanimity instruction included in the booklet of instructions to the jury provided: "The defendant is charged with crimes that have more than one act that could constitute the offenses. [¶] The People have presented evidence of more than one act to prove that the defendant committed these offenses. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at

count 5 of various acts that are fragmented by time. However, we conclude the trial court's error in failing to read the unanimity instruction is harmless beyond a reasonable doubt because we also conclude the jury would have reached the same verdict absent the error. (See generally *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824].)

At various times during trial, the court provided instructions to the jury that adequately informed them to weigh each count separately, and emphasized the importance of relying on the written instructions in their deliberations. For instance, the court in its opening remarks instructed the jury as follows: "[E]verything I read to you now . . . I give it to you in writing. So instead of having you worry right now about taking notes and making sure you heard what I said, you know you're going to hear it again, you know you're going to see it again."

At the close of evidence, the court instructed the jury as follows: "Everything I read to you I [will] give to you in writing. You're going to get this booklet." The booklet included the written version of modified CALCRIM No. 3500. Further, the court told the jury, "the only law is the text of the instruction[s]."

The court also read CALCRIM No. 3550, which provides: "Your verdict must be unanimous. This means that, to return a verdict, all of you must agree to it." And the court instructed the jury: "Each of the counts charged in this case is a separate crime. You must consider each count separately and return a separate verdict for each one."

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least one of these acts and you all agree on which act he committed." (CALCRIM No. 3500 as modified.)

Finally, at the conclusion of closing argument, the court instructed the jury: "Your verdict must be unanimous which means that to return a verdict all of you must agree to it." The jury was given five verdict forms corresponding to each of the counts and was told: "If you are able to reach a unanimous decision on only one or some of the charges, fill those forms in only and notify the bailiff, returning any unsigned for which there is no decision."

Viewing the instructions as a whole, as we must (see *People v. Price* (1991) 1 Cal.4th 324, 446), we conclude the instructions the court read to the jury adequately apprised the jury of the requirement that it agree as to the same act or acts on which to base Douglas's conviction on count 5, and that any harm in failing to read modified CALCRIM No. 3500 was harmless beyond a reasonable doubt. (See *People v. Wolfe, supra,* 114 Cal.App.4th at p. 187; see also *People v. Dieguez* (2001) 89 Cal.App.4th 266, 277 ["The failure to give an instruction on an essential issue, or the giving of erroneous instructions, may be cured if the essential material is covered by other correct instructions properly given. [Citations.]"].)

Moreover, we conclude the inadvertent failure of the trial court to read modified CALCRIM No. 3500 when instructing the jury was also harmless error because the jury actually received the text of this instruction in the instruction booklet referenced by the court and the parties during closing arguments.[6]

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6 Douglas's reliance on *People v. Murillo* (1996) 47 Cal.App.4th 1104 does not support reversal of his conviction on count 5. There, the trial court neglected to read an instruction regarding a willfully false witness, but included that instruction in the packet

Finally, because Douglas was separately convicted of all five counts, each with a separate verdict form, we can reasonably infer the jury was not wavering on whether to believe certain facts. For this additional reason we conclude the court's failure to read modified CALCRIM No. 3500 was harmless beyond a reasonable doubt and thus did not require the court to stay sentence on count 5 pursuant to section 654, subdivision (a). (See *Chapman v. California*, *supra,* 386 U.S. at p. 24.)

B. *Section 654*

Douglas alternatively contends that even if the court did not prejudicially err in failing to read modified CALCRIM No. 3500, his sentence nonetheless should be stayed on count 5 because that offense "was" based on the same behavior as counts 2 or 3. We disagree.

Section 654, subdivision (a) provides in part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

Under section 654, "[i]f all the offenses are incidental to one objective, the defendant may be punished for any one of them, but not for more than one. On the other hand, if the evidence discloses that a defendant entertained multiple criminal objectives

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that was given to the jury to use for its deliberations. The court in *People v. Murillo* looked at the instructions read to the jury, counsel's arguments in closing and determined there was no reasonable probability (under the lesser standard announced in *People v. Watson* (1956) 46 Cal.2d 818, 836) defendant would have achieved a better result if the instruction had in fact been read to the jury. (*People v. Murillo, supra,* 47 Cal.App.4th at p. 1108.)

which were independent of and not merely incidental to each other, the trial court may impose punishment for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct." (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135; see also *People v. Latimer* (1993) 5 Cal.4th 1203, 1208.)

It is the defendant's intent and objective, not the temporal proximity of his or her offenses, that determines the indivisibility of the transaction. (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) Section 654 allows multiple punishments for identical offenses, because the legislative intent of section 654 shows there is no bar to punishing those who are more culpable, and therefore, the punishment should fit the severity of the crime. (See generally *People v. Correa* (2012) 54 Cal.4th 331, 342.) " ' "[A] course of conduct divisible in time, although directed to one objective, may give rise to multiple violations and punishment. [Citations.]" [Citations.] This is particularly so where the offenses are temporally separated in such a way as to afford the defendant [an] opportunity to reflect and to renew his or her intent before committing the next one, thereby aggravating the violation of public security or policy already undertaken. [Citation.]' [Citation.]" (*People v. Andra* (2007) 156 Cal.App.4th 638, 640; see also *People v. Kwok* (1998) 63 Cal.App.4th 1236, 1253-1254.)

Whether a defendant had more than one criminal objective is a factual question, and the determination will be upheld on appeal if supported by substantial evidence. (*People v. Osband*, *supra*, 13 Cal.4th at pp. 730-731; *People v. Andra*, *supra*, 156 Cal.App.4th at p. 640.) Under this standard of review, we view the evidence favorably to

the sentencing decision and draw all reasonable inferences in its favor. (*People v. Andra*, at pp. 640-641.) Where, as here, the court does not expressly make a finding that the defendant committed divisible criminal acts, we will imply such a determination and review it for substantial evidence. (*People v. Alford* (2010) 180 Cal.App.4th 1463, 1468; *People v. Nelson* (1989) 211 Cal.App.3d 634, 638.)

Here, Douglas was convicted of distributing matter depicting a person under the age of 18 involved in sexual conduct (counts 2 and 3; § 311.1, subd. (a)), but count 2 was specifically for his actions on March 13, 2006, and count 3 was specifically for his actions on August 9, 2006. Count 5 was for violation of attempting to send harmful matter to a minor by electronic means (§§ 664 & 288.2, subd. (b)) between February 14 and August 9, 2006. This count encompassed many more acts of sending pornographic material than counts 2 or 3 because count 5 included acts separately committed in February, March and August 2006.

Further, Douglas's actions were spread out over a seven-month period, giving him ample time to reflect and renew his intent. However, because Douglas continued to contact Vanessa during this period of time, his continued violation of the law gave rise to multiple criminal objectives and intents. We thus conclude substantial evidence exists in the record to support the court's implicit finding that Douglas had multiple objectives and thus, could be properly punished for multiple crimes.

Douglas's argument that there was but a single course of conduct is entirely unpersuasive. In *People v. Harrison*, *supra*, 48 Cal.3d at page 335, the court held that defendant was properly convicted of three separate counts of sexual penetration with a

foreign object and that section 654 did not bar separate penalties because of multiple objectives and culpability.

Similarly, here Douglas was properly convicted and sentenced for his offenses that spanned seven months, and each offense was based on separate acts committed at separate times. We thus conclude the court did not err in declining to stay under section 654, subdivision (a) Douglas's sentence on count 5.

DISPOSITION

Douglas's judgment of conviction and sentence are affirmed.

BENKE, Acting P. J.

WE CONCUR:

NARES, J.

O'ROURKE, J.